DOCUMENT RESUME

ED 208 575 EA 014 153

AUTHOR Weiler, Hans N.
TITLE Equal Protection, Legitimacy, and the Legalization of Education: the Role of the Federal Constitutional Court in West Germany.
INSTITUTION Stanford Univ., Calif. Inst. for Research on Educational Finance and Governance.
SPONS AGENCY Ford Foundation, New York, N.Y.; National Inst. of Education (ED), Washington, D.C.; Spencer Foundation, Chicago, Ill.
REPORT NO IFG-PB-81-A16
PUB DATE Sep 81
GRANT OB-NIE-G-78-0212
NOTE 50p.
AVAILABLE FROM Publications, Institute for Research on Educational Finance and Governance, CERAS Bldg., Stanford University, Stanford, CA 94305 ($1.00).

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Constitutional Law; Court Litigation; Educational Legislation; Elementary Secondary Education; *Equal Protection; Foreign Countries; Legal Problems
IDENTIFIERS *West Germany

ABSTRACT

To provide a comparative perspective on the legalization of education, the author analyzes the role of the West German Federal Constitutional Court in shaping educational policy. He identifies two constitutional norms the court uses to interpret the relationship between education and the state: equal protection and the legitimacy of educational decision-making and policy formation. Efforts to make current practices in German education comply with these norms have led the court to develop its own notion of legalization in the twin principles of "statutorization" and "parliamentarization." The author argues that while the court succeeds in satisfying the equal protection norm, it may have underestimated the seriousness of the legitimacy issue. The paper concludes with preliminary notes comparing this analysis with parallel considerations in the legalization of American education. (Author/JEH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED208575

IFG

Institute for Research on Educational Finance and Governance

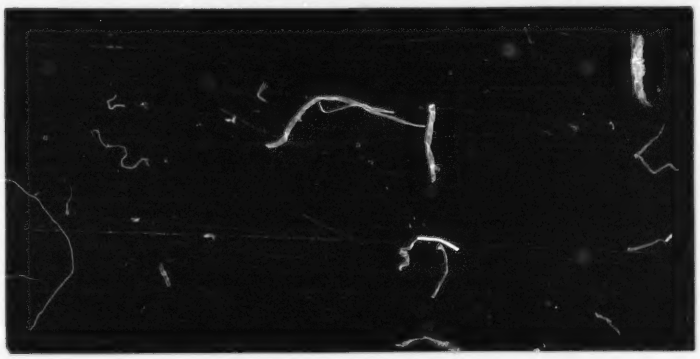
SCHOOL OF EDUCATION STANFORD UNIVERSITY

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.

Minor changes have been made to improve reproduction quality.

Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.



EA 021 153

Project Report No. 81-A16

EQUAL PROTECTION, LEGITIMACY, AND THE LEGALIZATION OF EDUCATION: THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT IN WEST GERMANY

Hans N. Weiler*

September 1981

*The author is Professor of Education and Political Science, Stanford University.

Research for this paper was supported by funds from the National Institute of Education (Grant No. OB-NIE-G-78-0212), the Spencer Foundation, and the Ford Foundation. The analyses and conclusions do not necessarily reflect the views or policies of these organizations. An earlier draft of this paper was presented to the Stanford-UC Berkeley Seminar on Law and Governance of Education, sponsored by the Institute for Research in Educational Finance and Governance (IFG) at Stanford University. Participants in the seminar made helpful suggestions for the revision of the paper. The author would also like to acknowledge the assistance and comments of Klaus Faber, Lawrence Friedman, David Kirp, Henry Levin, and Ingo Richter.

INSTITUTE FOR RESEARCH ON EDUCATIONAL FINANCE AND GOVERNANCE

The Institute for Research on Educational Finance and Governance is a Research and Development Center of the National Institute of Education (NIE) and is authorized and funded under authority of Section 405 of the General Education Provisions Act as amended by Section 403 of the Education Amendments of 1976 (P.L. 94-482). The Institute is administered through the School of Education at Stanford University and is located in the Center for Educational Research at Stanford (CERAS).

The research activity of the Institute is divided into the following program areas: Finance and Economics; Politics; Law; Organizations; and History. In addition, there are a number of other projects and programs in the finance and governance area that are sponsored by private foundations and government agencies which are outside of the special R&D Center relationship with NIE.

ABSTRACT

The paper provides a comparative perspective on the legalization of education by analyzing the role of the Bundesverfassungsgericht (Federal Constitutional Court) in the shaping of educational policy in West Germany. It identifies two related, but different constitutional norms which the Court brings to bear upon its interpretation of the relationship between education and state: (a) the norm of equal protection, which has had a particularly precarious role in the German constitutional tradition as far as education was concerned; and (b) the norm of legitimacy as it relates to the decision-making process through which educational policy is set. Its efforts to make current practices in German education comply with these norms lead the Court to develop its own notion of legalization in the twin principles of "statutorization" and "parliamentarization". The paper argues that, while the Court succeeds reasonably well in terms of satisfying the equal protection norm, it may have underestimated the seriousness and precariousness of the legitimacy issue. The paper concludes with some preliminary notes on comparing this analysis with what appear to be parallel considerations in the legalization of American education.

CONTENTS

1. The Legalization of Education in West Germany: The Institutional and Policy Context 3

1.1 The Federal Constitutional Court 3

1.2 Educational Policy and Educational Reform 8

2. Legalization and Judicialization in West German Education 12

3. Equal Protection and Legitimacy: The Role of the Federal Constitutional Court in the Legalization of Education 19

3.1 Equal Protection 21

3.2 Legitimacy 23

3.3 "Statutorization" and "Parliamentarization" 25

4. The Legalization of Education: Some Critical and Comparative Notes 30

4.1 Equal Protection and Legitimacy: The Achievements and Limitations of Legalization 30

4.2 The Legalization of Education in Comparative Perspective 33

NOTES 38

REFERENCES 39

Theoretically inspired curiosity is bound eventually to lead the student of the legalization of education in this country to the question of whether or not what we observe here is a uniquely American phenomenon or whether it is shared in some way with other societies and thus indicative of an underlying and more generic set of issues and trends. This paper makes a modest effort at satisfying this curiosity by probing the case of a country which, while in general of the same "type" as the United States (advanced industrial, capitalist, polyarchic, federal, etc.), presents a potentially instructive mixture of similarities and differences when it comes to the legalization of education.

The analysis focuses on the role of the Federal Constitutional Court in the shaping of educational policy in West Germany. It identifies two related, but different constitutional norms which the Court brings to bear upon its views of the relationship between education and the state: (a) the norm of equal protection, which has had a particularly precarious role in the German constitutional tradition as far as education was concerned; and (b) the norm of legitimacy as it relates to the decision-making processes through which educational policy objectives are set and the means for their achievement elaborated. Its efforts to make current practices in German education comply with these norms leads the Court to develop its own notion of "legalization" in the twin principles of "statutorization" and "parliamentarization". Against the background of this development, the paper argues that the Court succeeds reasonably well in terms of satisfying the equal protection norm, but that it may have underestimated the seriousness and precariousness of the legitimacy issue.

The initial section of this paper provides an overview of the institutional and policy context in discussing both the role and functioning of

the Federal Constitutional Court and the educational policy setting within which the Court developed its views on the relationship of state and education. This development, i.e., the process of the increasing legalization of educational policy in the Federal Republic over the last decade or so, is then reviewed in more detail before the specific preoccupation of the Court with the twin issues of equal protection and legitimacy is examined. The paper concludes with a critical assessment of the achievements and limitations of the Court's efforts and some preliminary notes on comparing this analysis with what appear to be parallel considerations in the legalization of American education.

1. The Legalization of Education in West Germany: The Institutional and Policy Context

Patterns of legalization in any policy area are a function both of the institutional arrangements under which the judiciary operates and of the kinds of issues which claim particular salience in that policy area. For purposes of introducing the setting for the legalization of education in the Federal Republic, it is therefore necessary to understand the role and the functioning of that element of the judicial system which has become most influential in the process of legalization, i.e., the Federal Constitutional Court, as well as the state of educational policy which generated the kinds of issues and controversies around which the Court decided to clarify its views on the relationship between state and education.

1.1 The Federal Constitutional Court

While this is not the place to provide an extensive account of the judicial system of the Federal Republic of Germany and of the role of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in it, some observations on the particular nature of these institutional arrangements will be in order (for general background, see McWhinney 1962; Heyde 1971; Kommers 1976; 1980). As an independent separate institution for purposes of judicial review, the Federal Constitutional Court is a creation of the fathers of the post-World War II Federal Republic, conceived and initiated under the sponsorship of the Western Allied Powers, in 1948/49. The previous incarnation of German democracy, the Weimar Republic (1919-1933), had seen a number of modest attempts at instituting some form of judicial review in the Reichsgericht, and there had been a noticeable debate among legal scholars on the desirability of some form of judicial review since the middle of the nineteenth century. The mainstream of German legal tradition,

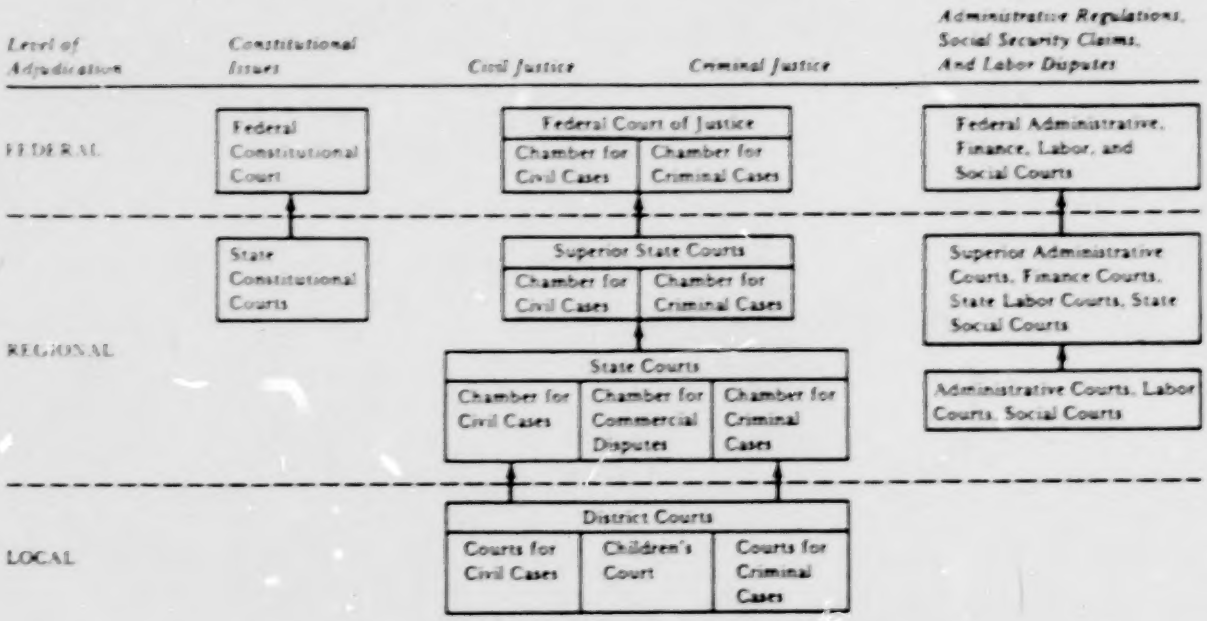
however, had found it difficult to accept the notion that the legislative process could be subject to an independent judicial review which held constitutional norms as a higher standard against which the validity of statutes could be evaluated. It was the experience of the feeble and largely ineffective system of judicial review in the Weimar Republic and of the large-scale corruption of the German legal system under the Nazi regime which, after World War II, placed the reorganization of judicial review high on the agenda of the framers of a new constitution, the Basic Law (Grundgesetz, GG). The result of their efforts was the creation of the Federal Constitutional Court which vested the function of judicial review in a supreme judicial body independent of the hierarchy of regular courts (dominated by the Bundesgerichtshof, BGH), or the system of courts for special jurisdictions (labor, fiscal, administrative, etc.).

[Figure 1 about here]

This structural option of a specialized, separate tribunal with exclusive jurisdiction to decide on constitutional questions varies from the American model of a unitary Supreme Court and exists in similar form in Italy and Austria (see Cappelletti and Cohen 1979). In the German case, a deep-seated suspicion of the regular judiciary on the grounds of their performance in Weimar and Nazi Germany seems to have reinforced the tendency towards that option (Kommers 1976, 35-42; cf. also the right of the BVerfG to dismiss federal judges in Art. 98, 2 GG). The Federal Constitutional Court itself won a major battle in its early days in achieving complete administrative independence of the Federal Ministry of Justice. Its judges are elected for one non-renewable twelve-year term by the two houses of the federal parliament: half by the Bundestag (lower house of popular representation), and half by the Bundesrat (upper house representing the Länder of

Figure 1

The Organization of the Court System in the Federal Republic of Germany



Source: Edinger 1977, 29

the Federal Republic). While this has, over the last ten years, introduced some of the polarization in German politics between Social/Liberal Democrats (who control the Bundestag and the Federal Government) and Christian Democrats (who control a majority of Länder and, hence, the Bundesrat) into the recruitment of judges to the Court, there seems to be consensus that the mode of election has helped sustain a high-quality and reasonably independent panel of judges.

The Court is organized into two chambers ("Senates") of eight judges each. The two Senates of the Court have exclusive membership and exclusive responsibilities for a subset of the Court's overall judicial mandate. The First Senate (often referred to as the "Basic Rights Senate") deals with issues of "norm control" (judicial review of decisions of other courts and of federal statutes) and with constitutional complaints where they pertain to rights guaranteed in the "basic rights catalogue" of the West German constitution (Art. 1-17 GG). The Second Senate, broadly speaking, deals with constitutional issues involving the state and its organs (hence "political" or "State's Rights Senate"), primarily issues of federal-state relationships and powers, disputes between federal agencies, election disputes, and the constitutionality of political parties (where extreme parties on both the right and the left have been outlawed in the earlier years of the Federal Republic under Art. 21, 2 GG). Even though the number of cases in each of the categories for which the Court has responsibility is not an entirely adequate measure of the importance of each category (for example, conflicts between federal and state government have been very few, but their resolution by the Court has had a major impact on the development of federalism in Germany), the following figures provide some indication of the Court's overall distribution of activity: Constitutional complaints

(Art. 93, 1, 4a and b GG; the only kind of dispute that can be submitted to the Court directly by individuals) make up the bulk of the Court's case load (96% of all cases submitted, and 55% of all published opinions; Kommers 1980, 663) and include most of the cases in which the Court has expressed itself on matters of educational policy. These complaints typically challenge the constitutionality of judgments rendered by ordinary or specialized courts, of federal or Land laws, or of administrative rules, actions, or decisions by federal, state, or local authorities. Concrete norm control (according to Art. 100, 1 GG) is the second most frequent type of case brought before the Court (1,576 cases by the end of 1977). Here the initiator is another court which suspends a pending litigation while seeking the Constitutional Court's ruling on a legal instrument about the constitutionality of which the initiating court has serious doubts. Other categories where cases are relatively frequent have to do with the continuance of law (Art. 126 GG), with cases of "abstract norm control" (Art. 93, 1, 2 GG; initiated by the Federal Government, a state government or one-third of the members of the Bundestag, and increasingly used to invite the Court's critical review of major legislative controversies such as abortion, the treaty with the GDR, acoustic surveillance for intelligence purposes, etc.; cf. von Beyme 1979, 224), election disputes and disputes among federal agencies (Organstreit). In terms of the Court's procedures, Kommers identifies four main differences between the German Constitutional Court and the U.S. Supreme Court: (a) In contrast to the largely discretionary nature of the Supreme Court's jurisdiction, the exercise of the BVerfG's jurisdiction is obligatory; (b) unlike the Supreme Court, the BVerfG justifies its decisions in written and usually rather formal and detailed opinions; (c) there is very little oral argument before the BVerfG, which instead prefers to consider its cases on the briefs

of the parties; and (d) there is a strong bias in the BVerfG in favor of "institutional opinions" and against written dissents; as a result, the number of the latter is extremely small, compared to the practice of the U.S. Supreme Court (1980, 663-664).

Looking back at 30 years of the Court's activities, what Alfred Grosser once called "the most original and interesting institution in the West German constitutional system" (cited by von Beyme 1979, 216) seems to have come to play a major role in shaping the political quality of the West German system -- as a "protector of individual rights", an "umpire of the federal system", a "custodian of party democracy", and an "equalizer of socio-economic opportunity" (Kommers 1976, 207-253). Up until 1919, and really, up until 1949, the particularly rigid interpretation of the notion of the separation of powers in the German legal and constitutional tradition had made any kind of effective judicial review impossible. By institutionalizing the concept of norm control, the Federal Constitutional Court has broken up this rigid interpretation and assumed an important directive role vis-a-vis the other powers, notably the legislature (Richter 1973, 35). It has done so both by declaring void those products of the legislative process which do not conform to constitutional norms and, increasingly, by getting the legislature to anticipate possible critical reactions by the Court (von Beyme 1979, 223). At the same time, the Court has established its independence of the other powers with enough credibility to have become a key element in the process of constitutional change or, more precisely, in the ongoing adjustment of the normative constitutional framework of the West German state to the changing conditions of social, economic, and political life. Its role in the shaping of educational policy is a case in point.

1.2 Educational Policy and Educational Reform

In its opinions on educational questions, the Federal Constitutional Court has reflected, and reacted to, an increasing level of controversy and conflict over educational policy objectives and over the strategies to achieve them. This level of conflict corresponds to the level of reform initiatives which was characteristic of educational policy in the Federal Republic in the later part of the 1960s and the early 1970s. After what had been aptly termed "Two Decades of Non-Reform in West German Education" (Robinsohn and Kuhlmann 1967), a number of factors, facilitated and catalyzed by the advent of the first social democrat/liberal coalition in the federal government in 1969, had led to a massive drive for change in both the structure and substance of West German education (for a more detailed review of that period, see Weiler 1973; 1979; OECD 1972; Max-Planck-Institut 1980; Rolff 1980; etc.).

Initially, the principal thrust of this reform was towards greater equality of educational opportunity, and its main target became the traditional, class-based differentiation of the German system of three-tiered post-elementary education. The keystone of the "new system" of education was to be the Gesamtschule, a comprehensive form of secondary school for grades 5 through 10 (and, ultimately, 12 or 13), over the introduction of which a bitter political struggle between liberal/progressive (Social Democrats and Liberals) and conservative (Christian Democrats) forces has been waged ever since. While the device of "experiments" with the new type of school (while leaving the majority of the old schools intact) served to temporize and hence defuse the conflict to some extent (Weiler 1981), enough parent concern on both sides of the issue had been aroused to lead to a veritable wave of litigation on various aspects of the "comprehensivization"

issue. The reverberations did eventually reach the Federal Constitutional Court, and one of the key decisions of the Court with which our analysis will have to deal arose directly out of these controversies. This decision (BVerfGE 34/165[2/] of 1972) had to do with the introduction of an obligatory Förderstufe ("promotion level") in the schools of the Land of Hesse (a "mini-comprehensivization" of the first two post-elementary grades) which a number of parents complained violated their constitutional rights under Art. 6,2,1 GG to choose freely between different forms of state-sponsored education. In this case, the Court ruled that the introduction of the obligatory Förderstufe was not per se in violation of the constitution, but proceeded to strike down some specific provisions of the disputed law which foreclosed the alternatives of private schooling or enrollment in a non-comprehensive program outside the local catchment area.

In a more recent case, the Court had to deal with a constitutional complaint filed by a number of Hamburg parents against a decision by the Land of Hamburg to introduce Gesamtschulen (comprehensive schools) as regular parts of the school system (rather than, as heretofore, as "experimental" schools). The Court ruled not to accept the complaint for review since, in the Court's view, it did not have a sufficient chance of success. In justifying this ruling, the Court explained that the state is within its constitutional rights when it decides on the organizational arrangements of schooling, and that the state's exercise of this right in this case does not infringe upon the parents' rights inasmuch as schools of the conventional, non-comprehensive type remain available (Decision of October 24, 1980 - 1 BvR 471/80[3/]).

After the Gesamtschule initiative to comprehensivize post-elementary education, the second major reform thrust was directed at the content of

West German education and generated a series of major curriculum reforms in most subjects. These reforms were guided by the dual attempt to bring advances in the academic "mother" disciplines of each subject matter area to bear upon a new curriculum (a proposition with considerable conflict potential, especially in such subjects as history, social studies, and German literature), and also to have the curriculum become more cognizant of the social and political realities of contemporary German society (Hameyer et al. 1976; Baumert and Raschert 1978). The results of such an ambitious and delicate undertaking were bound to be extremely controversial, and did generate a highly volatile situation in a number of West German Länder, notably North Rhine-Westphalia and Hesse. Not surprisingly, the question of how new contents of education were to be legitimately determined and developed became the subject of a good deal of litigational activity and raised once again, in a particularly intense form, the issue of the respective rights of parents and state in setting the objectives for the education of the young (cf. Richter 1973, 200-231). Eventually, it was the question of sex education which became the vehicle for bringing this issue to the attention of the Federal Constitutional Court. The Court, in December of 1977, took up the issue in reacting both to a "constitutional complaint" submitted by parents in the State of Baden-Wuerttemberg and a formal "norm control" request in which the Federal Court of Administration had asked the Constitutional Court to determine the constitutionality of a 1973 educational statute of the Land of Hamburg. The Constitutional Court's decision (BVerfGE 47/46), the legal reasoning of which will be analyzed later, (a) affirmed the right of the state to organize sex education in public schools, (b) spelled out certain principles for this kind of instruction, notably in terms of openness to different religious and philosophical

persuasions, (c) granted parents the right to be informed, but not the right to decide on whether or not there should be sex education, and (d) reaffirmed the principle of "statutory reserve" (Gesetzesvorbehalt) for decisions on the introduction of such important curricular elements as sex education.

Thus, in the educational policy scene in the Federal Republic since the mid to late sixties, it was the issue of comprehensive schooling and of curriculum reform which claimed principal political and judicial attention, and which gave the Federal Constitutional Court its more important opportunities for clarifying many of the normative issues involved in the relationship between education and the state, notably -- as we will discuss below -- the issues of equal protection and legitimacy. In addition to the questions of comprehensive schooling and curriculum reform, however, a number of other educational matters came to engage the attention of the Court in the course of the 1970s and provided it with additional opportunities for pursuing this task of constitutional clarification. Among these were the issues of limiting access to higher education through a numerus clausus system (BVerfGE 33/303; cf. 37/104), the reform of vocational education (BVerfGE 26/246), the reform of the upper level of secondary schooling (grades 11-13) (BVerfGE 45/400), and the conditions under which a student can be expelled from a public educational institution (BVerfGE 41/251). We will return to the documentation on these opinions as sources for interpreting the Court's guiding concerns in dealing with questions of education.

2. Legalization and Judicialization in West German Education

The "revolution in the relationship of law and social policy" of which Nathan Glazer (in Kirp and Yudof 1974, xxxv) speaks with regard to the U.S. has an equally significant parallel in the Federal Republic of Germany. Over the past decade or so, the salience of legal norms for the shaping of educational policy and practice and the importance of judicial decisions for the task of running schools has been one of the most conspicuous phenomena here as well as there; nor is education particularly unique in this respect: other areas of social policy, notably in the fields of energy, health, transportation, have similarly seen legal norms and processes assume a more and more central role (see, for some interesting observations on the energy field, Nelkin and Pollak 1981, 155-166; Kitschelt 1980, 272-279). Between them, court and legislatures in both countries have invaded in great strides decision-making territory which used to be the uncontested domain of school administrators in (German) state ministries of education and (American) local school district offices. The range of educational issues which has been affected by this process has encompassed, again in both countries, a wide variety of questions, ranging all the way from matters of discipline to the determination of educational objectives and from teacher tenure to equity in access and resource allocation (see, for the U.S., Kirp & Yudof 1974; Kirp 1977; Greenberg et al. 1979; Feeley et al. 1979; for West Germany, Richter 1973; 1974; 1976; Oppermann 1976; Nevermann & Richter 1979; Laaser 1980). For the U.S., Kirp has noted recently that the pace of judicial involvement, after the peak that was reached in the period between the U.S. Supreme Court's Brown (1954) and its Rodriguez decisions (1973) has now "slackened noticeably" (1977, 120). While this seems true for this country and, in a slightly different sense, in West Germany as well, this period of

intense judicial involvement has left a major impact on the educational policy scene and its political determinants in both countries.

Before discussing in more detail the nature of this process in the case of the Federal Republic, however, some brief note on terminology and coverage may be in order. This paper is to some extent interested in judicialization, i.e., in the increasing involvement of judicial institutions in the process of shaping and re-shaping educational policy and practice. However, judicialization per se is neither central to the argument that is being made here (although important to it in an indirect way), nor do we claim anything like full coverage of the various levels and form of judicialization in German education; to accomplish the latter, we would have to devote a good deal more attention to the courts in both the regular and specialized jurisdictions of the West German judicial system, where the vast majority of education-related cases is being handled and disposed of. By contrast, we are more directly and centrally concerned with the phenomenon of legalization; however, the West German case (and probably other cases as well) suggest an important distinction between two different meanings of legalization: In its broader sense (in which we will deal with it primarily in the present section), legalization refers to the increasing importance of legal norms (of legislative or judicial origin) in educational policy and practice -- a development for which the term Verrechtlichung has become a rather current label in German (e.g., Laaser 1980). In this sense, judicialization plays a role insofar as the judiciary participates in the process of creating and developing legal norms, which is somewhat less than in a common law system, but still, as we will see, far from trivial. In fact, Laaser observes for the German case (1980, 1358) that judicialization appears to have paved the way for legalization in the sense that a large

number of court decisions on various aspects of education had begun to create, in what was largely a legal "vacuum", an incipient legal framework, for the consolidation and legitimation of which the active role of the legislatures became ultimately indispensable.

In a second, narrower sense, we mean by "legalization" the development of the specific principle of "statutory reserve" (Gesetzesvorbehalt) or "parliamentary reserve" (Parlamentsvorbehalt) which posits that certain kinds of educational decisions are sufficiently relevant to constitutional considerations to require formal statutory enactment. It is this notion of "legalization" in the double sense of "statutorization" and "parliamentarization" which, as will be discussed in the next section, has come to play a key role in the clarification of the constitutional relationship between state and education. In setting up and developing this postulate, the judiciary, and especially the constitutional judiciary, has been of critical importance.

In its broader sense, the process of legalization in education in West Germany has been remarkably similar to what has gone on in this country, even though the legal traditions, the institutional arrangements for judicial and legislative processes, and the political context produce some modest variations in both the nature and the results of the process. The major elements of the process as it has occurred in West Germany can be seen as

(a) the recognition and expansion of the "justiciability" of educational measures and decisions which had theretofore been considered subject largely to pedagogical considerations and outside the realm of judiciary action;

(b) the limitation of educational options by judicial action and/or legal norms; and

(c) the judiciary's insistence on a substantially increased level of involvement of the parliamentary legislature in shaping the legal framework of education (Laaser 1980).

In addition, and largely as a consequence of these developments, one also observes a growing use of legal arguments in the political debate over educational policy (Nevermann 1979, 132). In a more substantive typology of the kinds of educational issues for which legalization has become particularly important, Richter (1974, 11-18) emphasizes issues of socialization (as in controversies over curriculum change), differentiation (as in disputes over the timing and criteria of selection in education), and "pluralism" (as in conflicts among different societal interests over their expectations of the educational system).

In order to shed some further, concrete light on the relationship between judicialization and legalization, it will be useful to look briefly at the ways in which, and the issues over which, the courts in West Germany became involved in matters of education. After the Land Administrative Court of the Rhineland-Palatinate, as late as 1954, had still refused to review a student's non-promotion (from one grade to the next) on the grounds that this was a matter of pedagogy and not of law, the late 1950s and the 1960s saw an increased willingness on the part of the courts to become involved in a variety of educational litigations, most of them dealing with such things as students' expulsion, examinations, promotions, and discipline. This involvement produced a substantial body of court-set legal norms (not exactly the most typical form of law-making in a non-common law system) without, at least for the time being, any basis in, or backing by, a duly enacted set of statutes (Laaser 1980, 1348-1352; cf. Oppermann 1976, C59-C62). Later on, mainly in the 1970s, the range of issues submitted to litigation

expanded further to include, as we have seen in the previous section, curricular questions, the internal organization of schools, the numerus clausus practice in university admissions, vocational education, etc. Most of these cases go back to instances where parents had felt that their or their children's rights had been violated by one or another educational decision and where courts acceded to their claim that this had created a judiciable case. Many of the cases, however, went beyond the resolution of a particular litigation and became one of the vehicles for the overall process of legalization in that they led to the enactment of a wide range of statutory provisions for the conduct of the educational system; in addition, it was partly in dealing with constitutional complaints arising out of these court cases that the Federal Constitutional Court, dealing with "legalization" in the narrow sense, developed its position on the principle of "statutory reserve" (Gesetzesvorbehalt).

The judges, faced with the emerging wave of litigation in educational matters, were forced to move into new territory in more than one sense. Not only was there a dearth of statutory norms against which such issues as the equity of grading practices in the Abitur or a school's right to expel a student could be adjudicated, but the West German constitution itself (very much unlike its predecessors of 1849 and 1919) had been remarkably reluctant to specify any constitutional provisions for education (with the exception of Art. 7 GG, which deals with the state's general supervisory authority over the educational system, the question of religious instruction, and the right to establish private schools). As a result, the courts, as long as they maintained the justiciability of the kinds of educational issues that were brought before them, had to reach out and derive a whole set of legal norms more or less directly from the more general

provisions in the Basic Law (again, a giant step for former Roman as compared to former British colonies), notably the provisions on the free development of personality (Art. 2, 1 GG), the principle of equality (Art. 3 GG), parents' rights (Art. 6, 2 GG), and the right to a free choice of trade or profession (Art. 12, 1 GG). (See, for examples and further discussion, Laaser 1980, 1354-1357; Oppermann 1976, C81-C104; Richter 1976; Nevermann & Richter 1979, Part II). As a result of this process, one of the most important elements in the first phase of the legalization of education in Germany has been the creation of rather specific legal norms on education in direct derivation from the principles of constitutional provisions which had not originally been designed with educational applications in mind. While this "norm creating" effort served to fill, for the time being at least, the void of lacking statutory provisions, it was also bound to raise the question, from yet another angle, of the legitimacy of the norms under which educational policy was to be made and conflicts over its implementation to be adjudicated.

No analysis of the legalization of education in West Germany would be complete without discussing at considerable length the relationship between federal and Land authority in education. Not only does this relationship, which has undergone substantial changes since the framing of the Basic Law, raise a number of important legal and constitutional issues; it has also become, especially in the wake of the Federal Government's publication of the Strukturbericht (Bundesminister für Bildung und Wissenschaft 1978) arguing for far-reaching reconsiderations of the relationship, a highly controversial political issue. Since it is impossible within the scope of this paper to do justice to the complexity of this set of issues, however, remaining incomplete in that important respect is unavoidable (see, for

further documentation on the federal issue in German education, Oppermann 1976, C64-C74; Bundesminister für Bildung und Wissenschaft 1978; 1980; Faber 1978; and, for an excellent comparative study of similar issues in a number of different countries, Bothe et al. 1976). There are points, however, at which the federal issue and the broader process of legalization with which this paper deals touch each other. The effort by the courts to develop, in the face of constitutional vagueness and statutory void, an adequate normative framework for the adjudication of conflicts within the educational system had one curious twist: it short-circuited, as it were, the federal issue by translating general constitutional norms set up at the federal level in the Basic Law into legal provisions which largely applied to the state level (since it is at the state level that most educational decisions are made). This argument about a "federal bias" in the progressive legalization of education has loomed fairly large in the debate about federalism in German education (cf. Laaser 1980, 1355) and may have become magnified unduly (as in Oppermann's point about the Federal Constitutional Court's usurpation of the role of a Federal Minister of Education; 1977). Whatever a further analysis of this issue may yield, however, it seems clear that from the point of view of the federalism issue, the net effect of the norm-setting activities of the courts tended to reinforce (or at least not to offset) the political, economic and logistical momentum towards more federal authority in education, which became an important element in German educational policy especially in the 1970s.

3. Equal Protection and Legitimacy: The Role of the Federal Constitutional Court in the Legalization of Education

In view of what has been said above about the role which the Federal Constitutional Court had come to assume in West German politics in general, and in the interaction between social and constitutional change, in particular, it is not surprising that the interpretation of constitutional norms for purposes of guiding educational policy and practice became a rather salient item on the Court's agenda. Given the relative dearth of legal norms -- constitutional as well as statutory -- concerning education and the increasingly problematic practice of filling this void either through administrative decisions or through the constitutional interpretation of various courts in the course of handling educational litigation, the Court seems to have responded with particular attention to some of the educational cases brought to its attention. In dealing with these cases, the Court makes its own contribution to the process of deriving specific legal norms for education from the constitutional provisions of the Basic Law. In the process, the Court affirms the validity of the Basic Law and its provisions (including its basic rights catalogue) as a direct source of guidelines for establishing legal norms in education and for adjudicating conflict over educational decisions. More importantly, it establishes the parameters for dealing with the kinds of conflict which had tended to arise over potentially competitive constitutional norms. A case in point, which looms large in a number of the Court's most recent decisions on educational matters, is the relationship and reconciliation of the constitutionally guaranteed norms of the right of parents to be primarily responsible for the "care and upbringing of children" (Art. 6, 2, 1 GG), and the state's supervisory responsibility for "the entire educational system" (Art. 7, 1 GG; cf. Also Richter 1973,

44-76). The potentially competing claims of these two norms are further complicated by the frequent invocation, on behalf of the child, of the basic right to the "free development of personality" (Art. 2, 1) which is also held to conflict with the state's right to structure public education.

This issue of the competing norms of the Basic Law played a central role in two Court decisions reached in 1977, dealing with the reform of the upper three grades (11-13) of the Gymnasium in the Land of Hesse (BVerfGE 45/400) and with the introduction of sex education in Hamburg and Baden-Wuerttemberg (BVerfGE 47/46). In each of these, as in a number of similar cases, the Court goes to considerable lengths discussing the "tensions" between parents' rights, personality rights of the child, and the educational mandate of the state. The Court ends up deciding largely against the parents' constitutional complaint in both cases, affirming the state's responsibility to determine both the structure and, to a considerable extent at least, the content of education (BVerfGE 45/400, 415-417; 47/46, 65-78). It does so, however, in clearly dissociating itself from the more authoritarian conception of the state's educational mandate in the Weimar Republic (BVerfGE 47/46, 80) and in imposing on the contemporary state a rather stringent set of conditions for assuring the legitimacy of its policies in constitutionally and normatively as delicate a field as education (ibid., 80-83).

These kinds of decisions quite accurately reflect the Court's overall orientation towards the relationship between education and the state, and reveal the importance for the development of this orientation of the Court's twin preoccupations with the norms of equal protection and legitimacy. In dealing with these two concerns in turn, we will show how both of them have led the Court to developing its own precept of "legalization".

3.1 Equal Protection

In emphasizing the applicability of the equal protection norm of the West German constitution (Art. 19, 4 GG) to the realm of public education, the Court affirms its fundamental opposition to the time-honored and powerful notion of the "special authority relationship" (besonderes Gewaltverhältnis) in the tradition of German political and legal theory and practice. This notion of the "special authority relationship" has its origin in strongly etatist German traditions, and particularly in the attempt to come to legal terms with the relationship between citizenry and monarchy or between the sovereignty of the people and that of the crown. Given the more absolutist bias in traditional European and German notions of the state, certain areas of state activity were seen as strictly exempt from any popular authority, and were legally construed as internal to the state and thus outside of the regular legal norms which governed the society at large. Included in this domain of the "special authority relationship" were notably civil servants, soldiers, prisoners, and school children. Within this domain, whatever rights under the existing legal order regular citizens enjoyed did not apply; decisions taken by the state with regard to these "exempt" domains and populations neither required any statutory basis, nor were they subject to review as to their legality by the courts (Laaser 1980, 1350; cf. Oppermann 1976, C46-C48).

The Federal Constitutional Court has consistently argued that the 1949 Basic Law abolished the notion of the "special authority relationship," and has affirmed this interpretation in a number of landmark cases for education as well as for the other previously "protected" areas. Against the general background of the "legality principle" (Rechtsstaatsprinzip) of the Basic Law (Art. 20, 3 GG), the Court has affirmed the unrestricted and indivisible

validity of the "equal protection clause" of Art. 3 and 19 GG in striking down a variety of statutes, decisions, and practices depriving "special populations" of their rights under the constitution (e.g., BVerfGE 33, 1 in the case of prisoners). For education, the Court has taken the constitutional complaint of a student who was expelled from a public school for disciplinary reasons as an occasion to emphasize the abolition of the "special authority relationship" for the domain of schools as well. It refers to both its own and the decisions of other courts that, far from being exempt from the legal order, education was particularly in need of the clarifying and protective effects of duly enacted legal norms, as "the existing regulatory deficit makes a clear comprehension of applicable rules as well as the legal protection of the parties involved particularly difficult" (BVerfGE 41/251, 259-260). The Court acknowledges, incidentally, on a number of occasions the important role played by legal scholarship in helping to bring about and sustain this important move to the undivided validity of the principle of equal protection; two major legal conventions are singled out as having for the field of law and education, played a particularly significant role: the convention of German professors of constitutional law in 1964 (BVerfGE 41/251, 259) and the 51st Deutscher Juristentag of 1976 (BVerfGE 45/400, 418; 47/46, 79).

The result of these efforts on the part of the Federal Constitutional Court to affirm the extension of the equal protection clause of the Basic Law to the realm of schooling was its renewed emphasis on the principle of "statutory reserve" (Gesetzesvorbehalt). It is this principle which is designed to lead the schools out of the domain of internal administrative rule-making and into the open air of duly enacted statutory norms: wherever "essential" (wesentliche) aspects of education are involved, administrative

decrees and ordinances will not do, and a formal statutory basis will be required. By 1977, the Court finds that this principle has at last been accepted into legal thought about education, even though the question of what is and is not to be considered "essential" remains a matter of some continuing dispute (BVerfGE 47/46, 78-80; see also below).

3.2 Legitimacy

Its concern with the principle of equal protection and its application to the field of education was one of the driving elements in the Court's emphatic affirmation of the Gesetzesvorbehalt. It was not the only one, however. In addition to its desire to overcome the authoritarian vestiges of the "special authority relationship" for schools, the Court had become increasingly concerned over what it saw as a major "legitimacy deficit" in the way in which important educational policy decisions were arrived at. This "deficit" was seen as stemming from the conspicuous non-involvement of parliamentary legislatures in the process of setting educational norms and objectives and the resulting disproportionate share of power that had thus accrued to the executive bureaucracy in matters educational. The Court's postulate of statutory reserve in education thus acquires the synonym of "parliamentary reserve" (Parlamentsvorbehalt) which emphasizes the particular weight which making all major educational decisions subject to formal legislative action would bring to bear upon the legitimacy of those decisions. In developing this line of its argument, the Court assumes a rather critical stance towards the widely prevailing practice in West Germany to determine and conduct educational policy largely by administrative ruling without much, if any, legislative backing. Oppermann speaks of the "marginality" (Randsiedlertum) of educational administration in the framework of the constitutional state, which had in practice arrogated to itself the right

to determine when, for a given educational decision, a formal statutory basis was needed or an administrative decision sufficient (1976, C48).

With reference to the legitimacy mandate of the Basic Law (Art. 20, 2: "All state authority emanates from the people"), the Court affirms that "the democratic principle would demand that the regimentation of important domains of life should at least in its basic outline fall under the responsibility of the democratically legitimated legislature itself and be designed in a public process of decision-making which would weigh all the different and sometimes conflicting interests" (BVerfGE 41/251, 260). Against this background, there is for the Court no more "room for the extra-statutory (gesetzesfrei) conduct of schooling by the executive without the involvement of parliament" (ibid., 263).

In explicitly invoking the norm of legitimacy for developing its views on the relationship between state and education, the Court appears to echo and recognize a much more widely held concern over the credibility and legitimacy of the state's authority in setting and implementing policy. This concern is being expressed with increasing intensity by analysts of the modern state from a wide variety of perspectives, ranging from the Trilateral Commission (Crozier et al. 1975) to the West German Political Science Association (Kielmannsegg 1976; Ebbighausen 1976) to a variety of recent analyses inside and outside the Marxist tradition (e.g., Offe 1972; Habermas 1975; Wolfe 1977; Lindberg et al. 1975; Herz 1978; Rose 1980; Freedman 1978; Wolin 1980; Dahrendorf 1979; Weiler 1980). The assessment of the nature of the problem varies widely across these different analyses of the "legitimacy crisis" of the modern state, but the sense of powerlessness of individuals and groups in society vis-à-vis an all-powerful and non-representative governmental bureaucracy looms large in many of them.

Administrative bureaucracy is increasingly seen as "impersonal, coercive, and dehumanizing in its manner of dealing with the lives and fortunes of those it was created to serve" (Freedman 1978, 262) and thus reflects the worse aspects of a state which is faced with "a deep loss of confidence about the possibility of using (it) to good end" (Berger 1979, 33). While this erosion of legitimacy tends to affect the state as a whole, there seems to exist what I have called elsewhere a "legitimacy gradient" (Weiler 1980) which distinguishes in terms of the degree to which the different branches of governmental authority are affected by this erosion. The executive branch would be found at the bottom end of this scale inasmuch as it can neither claim the kind of legitimacy which the principle of representation confers upon parliament nor the legitimacy which judicial institutions enjoy by virtue of their close association with the traditions of legality. It seems that this "recurrent sense of crisis attending the administrative process" (Freedman, ibid.) has played an important role in reinforcing the Court's determination firmly to enforce the principle that "the really important things in a parliamentary-democratic state belong before parliament" (BVerfGE 47/46, 79). Whether or not they are "safe" there as far as legitimacy is concerned is a question we will have to pursue further at a later point.

3.3 "Statutorization" and "Parliamentarization"

It is on the strength of this dual set of preoccupations -- equal protection and legitimacy -- that the Federal Constitutional Court formulates the most emphatic messages in its dispositions on the legalization of education. A number of cases (usually in the constitutional complaint category) are decided in favor of complainants on the grounds that a particular educational practice or decision is based merely on administrative rules and

lacks an adequate statutory base (e.g., BVerfGE 41/251; 47/46). In other cases, complaints are rejected on the specific grounds that the educational decision in question was based on duly enacted and sufficiently specific enabling statutes (e.g., BVerfGE 45/400, 417-420). In its decision on the Förderstufe in the Land of Hesse, the court finds the obligatory nature of the Förderstufe unconstitutional on the overriding grounds of violating parents' and children's rights, but affirms specifically that the policy does comply with the principle of the Gesetzesvorbehalt (BVerfGE 34/165, pp. 192-194).

Notwithstanding the decisiveness with which the Court affirms this principle, however, there remains the difficult question of how far and into how much detail the statutory guidance of educational decisions ought to go (Oppermann 1976, C48-C62; Richter 1976, 22-23 and passim). Some of the more recent decisions have shed some light on this question. In its decision on sex education (BVerfGE 47/46), the Court allows that not all the modalities of sex education need to be specified in statute form, but insists on a "parliamentary guideline decision" (parlamentarische Leitentscheidung); exactly what is to be covered by such a decision is to be determined by what is relevant to the participants' basic rights (grundrechtsrelevant). This would include, in the Court's view "the determination of the educational objectives in principle..., the question whether sex education should be offered as an interdisciplinary instructional principle or as a special subject of instruction with possible elective or voluntary status, the mandate of tact, tolerance and openness to the great variety of value positions in the realm of sexual behavior, the obligation not to indoctrinate the children, and the duty to inform the parents" (ibid., p. 83). In its extensive deliberations on the legalization of education in

the Federal Republic, the 51st Deutscher Juristentag, the regular synod of the German legal profession, established a set of educational issues which ought to be subject to formal statutory determination, and which includes not only the general educational objectives of the school, but also the catalog of instructional objectives, the catalog of subjects taught, the basic organizational structure of the school, participation of parents and students in the governance of the school, and the "status-generating norms" governing admission, advancement, examinations, expulsion, etc. While the Court mentions these recommendations in one of its decisions, in a context of generally favorable disposition, it does not explicitly endorse their full scope (BVerfGE 45/400, 418-419). The Court does determine, however, that the change of some of the basic structural conditions of the educational process, such as the dissolution of the class community in favor of a course system in the upper level of the Gymnasium, requires an explicit statutory mandate, as do changes in the basic mode of student assessment in view of their relevance to the student's standing and, hence, life chances (BVerfGE 45/400, 418). The operational criterion of relevance of a given decision to the student's (or parents') basic rights leads the Court also to be particularly stringent in its insistence on a statutory base where very consequential disciplinary measures such as a student's expulsion or suspension are concerned (BVerfGE 41/251, especially 262-266).

In thus affirming the legislatures' mandate to "legalize" education, the Court is seeking to achieve a dual objective: On the one hand, parliament (principally the Land legislatures) is called upon to consolidate into a statutory base the more and more complex legal framework which, given the initial absence of specific legal provisions for education, the regular judiciary had developed on a case-by-case basis; the "judicialization" of

education has thus paved the way for its legalization and "statutorization". At the same time, however, parliament taking charge of laying the legal groundwork of education is designed to restore the legitimacy of the state's role in education which the Court sees in jeopardy as a result of how far educational policy decisions have been allowed to gravitate towards the executive branch of government.

In both the judicial and the political realm, educational policy in the Federal Republic is beginning to show the effects of the Constitutional Court's mandate. In a recent decision, the Land Constitutional Court of Bavaria declared major portions of Bavaria's Allgemeine Schulordnung (School Code) unconstitutional on the grounds that they lacked an adequate statutory base. The decision had resulted from the case of a Bavarian high school student who had been suspended from her school for wearing in school a "Stoppt Strauss" button (against the then chancellor candidate of the Christian Democrats, Bavarian Minister-President Franz-Josef Strauss) in the 1980 federal election campaign. Without deciding on the suspension itself (which is still pending before the Land Administrative Court), the Bavarian Constitutional Court found that the student's right to political expression was of sufficient constitutional importance that limiting it could not be left to the Ministry of Education, but required the deliberation and action of the elected legislature (Arens 1981; Schueler 1980).

In a different development, a special commission appointed in 1978 by the German legal association (Deutscher Juristentag) has just submitted its proposal for a "model" education statute. The commission's work goes back to the deliberations of the 51st Juristentag in 1976 and has attempted to translate the "statutorization" mandate of the Federal Constitutional Court into a format which could serve to guide the legislative task which

all of the Land legislatures now face as a result of the Court's position. The commission's draft proposes statutory norms in all those areas which, taking the Constitutional Court's definition, could be regarded as "essential" aspects of education: The organizational differentiation of school systems, questions of promotion from one grade to the next and of transfer from one school to another, diplomas, discipline, the participation of parents, students and teachers, the designation of the school principal, the equality of foreign and German children in school, and a number of curricular guidelines, including the adoption of the principle of sex education in schools (Tagesspiegel 1981a; Baumert 1981). Already, the commission's proposal has generated a lively political debate (Tagesspiegel 1981b) which is likely to continue and intensify as Land legislatures face the task of writing laws that will govern the future of their educational systems.

4. The Legalization of Education: Some Critical and Comparative Notes

4.1 Equal Protection and Legitimacy: The Achievements and Limitations of Legalization

Since the efforts of the Federal Constitutional Court (and its allies in both the regular judiciary and the legal profession) towards the legalization of education were predicated on the twin preoccupations with equal protection and legitimacy, any critical assessment of the results of this effort should be guided by these two criteria.

As far as overcoming the legacy of the "special authority relationship" and extending the principle of equal protection to the field of education is concerned, the Court seems to have accomplished its task at least in doctrinal terms. The indivisibility of the equal protection guarantee of the West German constitution has been emphatically affirmed, and the Court has left Land legislatures with a reasonably clear mandate as to their obligation to legislate for the field of education. Parliamentary response to this challenge is likely to be slow, however, partly as a result of institutional reluctance on the part of legislatures to become involved in what promises to be an exceptionally complex and controversial legislative task (Baumert 1981, 1), and partly as a result of concerns, which are already beginning to be expressed, over the danger of "over-legalization". These concerns have been expressed primarily in terms of the possibility of "fixating" educational practice through legal (and, hence, presumably immutable) norms (Tagesspiegel 1981b), but also in terms of the risk of making federalism in education an even more cumbersome affair -- "a federalism with boots of concrete" as the Bavarian Minister of Education is quoted as predicting (Baumert 1981, 2). Concerns of this kind notwithstanding, however, and in spite of what is likely to be a protracted and difficult period of

legislative activity at the level of each Land parliament, it seems that the principle of "statutorization" has been firmly and realistically established, and that the way has been paved towards finally and effectively overcoming the legacy of the "special authority relationship".

Where the Court's concern with legitimacy is concerned, however, the situation may be less unequivocal. It is true that the Court's mandate for "parliamentarization" has shifted responsibility for "essential" decision-making in education from a "weak" (in terms of legitimacy) towards a relatively stronger branch of the state's authority. There is some reason to doubt, however, whether this shift has adequately taken care of the problem of legitimacy, and whether parliamentary institutions in the modern state do not face legitimacy problems of their own. Doubts of this kind feed on at least two different kinds of observations. On the one hand, there is an increasing body of analysis of the politics of advanced industrial societies which questions the viability and credibility of existing systems of parliamentary representation. This problem is presented variably as a result of "overload" of representative systems (e.g., Rose 1980) or, more poignantly, as the result of "a long-term decay of the collective agents of representation that once would have channeled new forces into the system: the political parties" (Berger 1979, 40). Following up on diagnoses of the mid-sixties on the decline of parliamentary institutions in Western Europe (Graubard 1967), Berger concludes that the process has continued since then, and attributes much of the current preoccupation with the legitimacy of the state to "the parties' diminished ability to receive the signals of changing social values and interest, let alone to express these changes in new programs, or to translate them into policy" (op. cit., 48).

Another, related reason for questioning the notion of the intact

legitimacy of parliamentary institutions of representation lies in the spectacular growth of various extra-parliamentary forms of political expression and aggregation, notably in the form of "citizens' initiatives". What Berger calls "the new politics outside" (op.cit., 38) has acquired considerable political significance in most Western democracies, and needs to be seen both as a symptom of the decline of traditional parliamentary representation and as a means to restore credible and legitimate avenues for the articulation and aggregation of social interests (e.g., Nelkin and Pollak 1981; von Alemann 1975; Offe 1972, 153-168). It is noteworthy that the German Bildungsrat, a semi-official advisory body charged by the government with making recommendations on, among other things, reforming the structures of governance in German education, made the shortcomings of parliamentary representation one of its key points of departure. Against this background of a serious "legitimacy deficit" in the traditional structures of representation, the Bildungsrat develops a model of educational governance in which more directly participatory forms of democratic articulation complement the parliamentary process (Deutscher Bildungsrat 1973, A14-23 and passim).

Whatever the true nature and extent of the "crisis of representation", it seems that there is something problematic about seeing the institution of parliament as the effective and ultimate answer to the problem of legitimacy in a matter as critical and susceptible to issues of credibility as education. If this is so, there are at least two ways of interpreting how the "parliamentarization" posture of the Federal Constitutional Court may affect the problem: In one sense, the Court's insistence on the legitimacy of parliamentary representation may, indeed, bolster the prestige and credibility of the institution and help it overcome its own "legitimacy deficit". In another, less sanguine sense, the seriousness of the problem

of representation in the modern state may be such that even as prestigious an institution as the Constitutional Court may provide little remedy, and that sooner or later the issue of the legitimacy of setting educational norms may call for another, more penetrating scrutiny.

4.2 The Legalization of Education in Comparative Perspective

A single-country case study is designed to identify and explain the dynamics of that case, and not to generate comparative insights. Nonetheless, the student of the legalization of education in the Federal Republic of Germany is bound to note some apparent parallels to developments or interpretations in the U.S. Without any pretensions fully to explore these parallels, it might be useful at least to point them out, and to suggest directions in which they might be more usefully explored. In keeping with the structure of the preceding analysis of the West German case, this brief comparative note will focus on the issues of equity and legitimacy.

As we have seen, one of the key contributions of the Federal Constitutional Court to developing and consolidating the legal framework for education had been the affirmation of the Basic Law's "equal protection clause" over the traditional norm and practice of the "special authority relationship" between schools and state. On the face of it, here lies a particularly close and striking parallel to the importance which judicial interpretation of the equal protection clause of the Fourteenth Amendment has had in the legalization of education in this country (cf. Kirp 1973; 1977, 118-120). To some extent, however, the semblance is misleading. It is true that the equal protection principle of the West German Basic Law did provide the Federal Constitutional Court with its main lever for overcoming the traditional "special relationship" doctrine and for thus "integrating" education into the mainstream of regular and indivisible justiciability. But it is

not much of an exaggeration to say that, once this was achieved, the Court left it at that as far as further bringing the equal protection principle to bear upon the legalization of education. Compared to the intense preoccupation of U.S. courts in cases like Serrano and Robinson with coming to terms with the constitutional issue and definition of equity (cf. Clune 1979; Kirp 1977; etc.), the German situation is conspicuous for a considerable reluctance of the judiciary in coming to judiciable terms with more material notions of equity or equal opportunity in education. Richter (1973, 183-199) sees this as part of a general backlog in German constitutional law in dealing with the "performance" mandate of the "social principle" (Sozialstaatsprinzip) in the German Basic Law, and notes the explicit statement by the Federal Constitutional Court that the principle of equal opportunity, while valid for the realm of the political process (e.g., for the competition among parties), definitely can not claim any validity where the free play of social forces is concerned (ibid., 185 and passim; on the Court's general record in dealing with equity issues, see McWhinney 1962, 49-51; Kommers 1976, 243-246). It will have to remain a task for further, and probably interesting, analysis to probe into this difference in the constitutional and legal treatment of the notion of equity, and to trace it both to the social determinants of the legal traditions in the two countries and to the political context in which contemporary challenges of alleged inequalities arise.

We have argued in this paper that the Federal Constitutional Court has been cognizant of the existence of a legitimacy problem in the making of educational policy, and that it has attempted to bring its institutional authority and prestige to bear on the remedial course of "parliamentarization". At one level of analysis, this process has a striking parallel to what has

been happening in the U.S. over the last fifteen or twenty years. In the context of discussing the effects which the series of equity-related court decisions of the Serrano kind have had on subsequent legislative and allocative action by state and federal lawmakers, Kirp sees the courts as "affording new legitimacy to particular equity-based concerns" (1977, 121) -- an observation which is further born out by the development of legislation for the education of handicapped children (ibid., 135). It seems that, in both the American and the German case, courts have a capacity for making legislative institutions do things which they don't seem to be able to do on their own political momentum; I have been tempted to call this phenomenon "compensatory legitimation" (Weiler 1980; 1981), and venture to suggest that it occurs in other policy areas besides education as well. In any event, it is clear that, in both cases, the courts' decisions have resulted in considerable legislative activity: towards greater equity in school finance and more adequate provisions for the education of handicapped children in the U.S., towards court-stipulated statutory norms for curriculum development, school organization, and disciplinary action in the Federal Republic. From the point of view of the legitimacy argument, however, there seems to be at least one important difference in the impact the courts have had in the two countries. In the U.S., the main thrust of the courts' message to the state's legislative and allocative authorities appears to have been material in nature: court decisions have tended to affirm substantive principles of educational policy in the form of equity standards (output or outcome), guidelines for bilingual education, and the like. By contrast, the German courts, and especially the Federal Constitutional Court, appear to have been much more reluctant to commit themselves and the ensuing legislative process to any material principles; instead, the main thrust there has been on

mandating a particular process which, in the form of the Gesetzesvorbehalt, made certain kinds of educational issues subject to formal legislative action. Even where, as in the case of weighing parents' rights against the state's authority over education, substantive principles were involved, the Court's ruling always tended to adopt a procedural solution. This difference may well have something to do with different judicial styles and traditions in the two countries, but probably also with the fact that our analysis of the German case has concentrated on the rather peculiar mode of jurisprudence of the Constitutional Court which, by the very nature of its judicial review mandate, has a propensity for procedural rather than material solutions (see on this characteristic of judicial review also Cappelletti and Cohen 1979, passim).

The question remains whether the doubts we have expressed, in the German case, about the ultimate success of the Constitutional Court's "parliamentarization" strategy from the point of view of the legitimacy of the educational policy process may lead to questions which ought to be raised in the American context as well. To answer this adequately would require a more thorough study of the relationship between courts and representative institutions in the U.S. However, to the extent that the legalization of education in the U.S. has resulted in a more substantial mandate for legislatures to become involved in educational matters, it seems appropriate to observe that the system of representation in the U.S. is becoming the target of some of the same kinds of preoccupations and skepticisms as is the case for their Western European counterparts. Amplifying what has earlier been said about the decline of party systems in Western democracies, Kaase, in one of the few empirical studies comparing legitimacy-relevant issues, singles out the United States as showing "a secular decline in the amount

and strength of party identification, associated with decreasing citizen affect for parties, increased split-ticket voting, and a looser relationship between party identification and the vote at all levels of the political system" (1980, 178); Wolin, after reviewing evidence on similar trends, casts his preoccupation with the American system of representation in the question: "if elections couldn't supply democratic legitimacy to the decisions of state, where could legitimacy be found?" (1980). Whatever the full story may turn out to be, there are unmistakable signs of erosion in the fabric of representative systems on both sides of the Atlantic, and it seems safe to assume that something as delicate and controversial as education may well be particularly affected by whatever "strain" or "crisis" may be in the offing.

NOTES

1. Research for this paper was supported by funds from the National Institute of Education (Grant No. OB NIE G 78 0212), the Spencer Foundation, and the Ford Foundation. The analyses and conclusions do not necessarily reflect the views or policies of these organizations. An earlier draft of this paper was presented to the Stanford-UC Berkeley Seminar on Law and Governance of Education, sponsored by the Institute for Research in Educational Finance and Governance (IFG) at Stanford University. Participants in the seminar made helpful suggestions for the revision of the paper. The author would also like to acknowledge the assistance and comments of Klaus Faber, Lawrence Friedman, David Kirp, Henry Levin, and Ingo Richter.

2. BVerfGE refers to decisions by the Federal Constitutional Court; they are typically cited with the first number indicating the volume, and the second the page on which the decision starts. The decisions are published periodically as Entscheidungen des Bundesverfassungsgerichts (Tübingen: J.C.B. Mohr). Quotations have been translated by the author.

3. This is the Court's internal reference to a decision, which is used as long as the decision is not published.

REFERENCES

Roman Arens, Schulordnung verfassungswidrig: Bayerischer Verfassungsgerichtshof: Es fehlte die gesetzliche Absicherung, in Der Tagesspiegel (West Berlin), May 30, 1981

Jürgen Baumert, Partei für die Schule: Anmerkungen zum Entwurf für ein Landesschulgesetz der Kommission Schulrecht des Deutschen Juristentages. Berlin: Max-Planck-Institut für Bildungsforschung, 1981 (mimeo.)

Jürgen Baumert and Jürgen Raschert, Vom Experiment zur Regelschule: Schulplanung, Curriculumentwicklung und Lehrerfortbildung in Zusammenarbeit von Lehrern und Verwaltung bei der Expansion der Berliner Gesamtschule. Stuttgart: Klett-Cotta, 1978

Suzanne Berger, Politics and Antipolitics in Western Europe in the Seventies, in Daedalus, Winter 1979, 27-50

Michael Bothe et al., Die Befugnisse des Gesamtstaates im Bildungswesen: Rechtsvergleichender Bericht. Bonn: Der Bundesminister für Bildung und Wissenschaft, 1976

Bundesminister für Bildung und Wissenschaft, Bericht der Bundesregierung über die strukturellen Probleme des föderativen Bildungssystems. Bonn: Der Bundesminister für Bildung und Wissenschaft, 1978

- Zum Thema: Bildungsföderalismus. Bonn: Der Bundesminister für Bildung und Wissenschaft, 1980

Mauro Cappelletti and William Cohen, Comparative Constitutional Law: Cases and Materials. Indianapolis: Bobbs-Merrill, 1979

William H. Clune III, with Robert E. Lindquist, Serrano and Robinson: Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation, in Malcolm M. Feeley et al., Schools and the Courts, Volume II. Eugene, Oregon: ERIC, 1979, 67-120

Michel J. Crozier, Samual P. Huntington, and Joji Watanuki, The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission. New York: New York University Press, 1975

Ralf Dahrendorf, Life Chances. Chicago: University of Chicago Press, 1979

Deutscher Bildungsrat, Zur Reform von Organisation und Verwaltung im Bildungswesen. Teil I: Verstärkte Selbständigkeit der Schule und Partizipation der Lehrer, Schüler und Eltern. Bonn: Deutscher Bildungsrat, 1973

Rolf Ebbighausen (ed.), Bürgerlicher Staat und politische Legitimation. Frankfurt: Suhrkamp, 1976

Lewis J. Edinger, Politics in West Germany: Second Edition. Boston: Little, Brown, 1977

Klaus Faber, Vielfalt und Einheitlichkeit im Bildungswesen, bundesstaatliche Aufgabenverteilung und parlamentarische Verantwortung, in Bildung und Erziehung 31, 3 (June 1978), 211-224

Malcolm M. Feeley et al., Schools and the Courts, Volume II. Eugene, Oregon: ERIC, 1979

James O. Freedman, Crisis and Legitimacy. Cambridge: Cambridge University Press, 1978

Stephen R. Graubard (ed.), A New Europe? Boston: Beacon, 1967

Jack Greenberg et al., Schools and the Courts, Volume I. Eugene, Oregon: ERIC, 1979

Jürgen Habermas, Legitimation Crisis. Boston: Beacon, 1975

Uwe Hameyer, Kurt Aregger, and Karl Frey (eds.), Bedingungen und Modelle der Curriculuminnovation. Weinheim Beltz, 1976

John Herz, Legitimacy: Can We Retrieve It? in Comparative Politics 10, 3 (April 1978), 317-343

Wolfgang Heyde, The Administration of Justice in the Federal Republic of Germany. Bonn: Press and Information Office of the Federal Government, 1971

Max Kaase, The Crisis of Authority: Myth and Reality, in Richard Rose (ed.), Challenge to Governance: Studies in Overloaded Politics. Beverly Hills: Sage, 1980, 175-198

Peter Graf Kielmannsegg, Legitimität als analytische Kategorie, in Politische Vierteljahresschrift 12, 3 (September 1971), 367-401

- (ed.), Legitimationsprobleme politischer Systeme (Sonderheft 7/1976 of Politische Vierteljahresschrift). Opladen: Westdeutscher Verlag, 1976

David L. Kirp, Judicial Policy-Making: Inequitable Public School Financing and the Serrano Case (1971), in Allan P. Sindler (ed.), Policy and Politics in America. Boston: Little, Brown, 1973

- Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement, in Harvard Educational Review 47, 2 (May 1977), 117-137

- and Mark G. Yudof, Educational Policy and the Law: Cases and Materials. Berkeley: McCutchan, 1974

Herbert Kitschelt, Kernenergiepolitik: Arena eines gesellschaftlichen Konflikts. Frankfurt: Campus, 1980

Donald P. Kommers, Judicial Politics in West Germany: A Study of the Federal Constitutional Court. Beverly Hills: Sage, 1976

- The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany, in Southern California Law Review 53, 2 (January 1980), 657-695

Andreas Laaser, Die Verrechtlichung des Schulwesens, in Max-Planck-Institut für Bildungsforschung, Bildung in der Bundesrepublik Deutschland, Vol. II. Hamburg: Rowohlt, 1980, 1343-1375

Leon N. Lindberg et al. (eds.), Stress and Contradiction in Modern Capitalism. Lexington, Mass.: Heath, 1975

Max-Planck-Institut für Bildungsforschung (ed.), Bildung in der Bundesrepublik Deutschland: Daten und Analysen (2 vols.). Hamburg: Rowohlt, 1980

Edward McWhinney, Constitutionalism in Germany and the Federal Constitutional Court. Leyden: Sythoff, 1962

Dorothy Nelkin and Michael Pollak, The Atom Besieged: Extraparliamentary Dissent in France and Germany. Cambridge, Mass.: M.I.T. Press, 1981

Knut Nevermann, Überlegungen zur Bürokratisierung des Schulwesens, in Werner Raith (ed.), Wohin steuert die Bildungspolitik? Frankfurt: Campus, 1979, 123-136

- und Ingo Richter (eds.), Verfassung und Verwaltung der Schule. Stuttgart: Klett-Cotta, 1979

Claus Offe, Strukturprobleme des kapitalistischen Staates. Frankfurt: Suhrkamp, 1972

Thomas Oppermann, Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen? in Verhandlungen des einundfünfzigsten Deutschen Juristentages, Band I, Teil C. München: Beck, 1976, C5-C108

- Commentary in Die Zeit of February 4, 1977, 31

Organisation for Economic Cooperation and Development, Reviews of National Policies of Education: Germany. Paris: OECD, 1972

Ingo Richter, Bildungsverfassungsrecht: Studien zum Verfassungswandel im Bildungswesen. Stuttgart: Klett, 1973

- Grundgesetz und Schulreform. Weinheim: Beltz, 1974

- Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen? (Referat auf dem 51. Deutschen Juristentag 1976.) Berlin: Max-Planck-Institut für Bildungsforschung (mimeo.)

Saul B. Robinsohn and J. Caspar Kuhlmann, Two Decades of Non-Reform in West German Education, in Comparative Education Review 11, 3 (October 1967), 311-330

Hans-G. Rolff, Soziologie der Schulreform: Theorien, Forschungsberichte, Praxisberatung. Weinheim: Beltz, 1980

Richard Rose (ed.), Challenge to Governance: Studies in Overloaded Politics. Beverly Hills: Sage, 1980

Hans Schueler, Eine Posse wird zum Politikum, in Die Zeit (North American edition), October 31, 1980

Der Tagesspiegel, Mehr Freiheit durch Gesetz: Juristentag veröffentlicht Musterentwurf für ein Landesschulgesetz, in Der Tagesspiegel (West Berlin). March 11, 1981a

Der Tagesspiegel, Stellungnahmen zum Musterentwurf, in Der Tagesspiegel (West Berlin), March 13, 1981b

Ulrich von Alemann (ed.), Partizipation, Demokratisierung, Mitbestimmung. Opladen: Westdeutscher Verlag, 1975

Klaus von Beyme, Das Politische System der Bundesrepublik Deutschland. München: Piper, 1979

Hans N. Weiler, The Politics of Educational Innovation: Recent Developments in West German School Reform (A Report to the National Academy of Education). Stanford: School of Education, 1973 (mimeo.)

Hans N. Weiler, Notes on the Comparative Study of Educational Innovation. Stanford: Institute for Research in Educational Finance and Governance, 1979

- Legalization, Expertise, and Participation: Strategies of Compensatory Legitimation in Educational Policy. Stanford: Institute for Research in Educational Finance and Governance, 1980

- Educational Policy as Compensatory Legitimation: The Case of the Federal Republic of Germany. (Paper prepared for the Western Regional Conference of the Comparative and International Education Society, Santa Barbara, November 1981), Stanford 1981 (mimeo.)

Alan Wolfe, The Limits of Legitimacy: Political Contradictions of Contemporary Capitalism. New York: Free Press, 1977

Sheldon S. Wolin, Reagan Country, in The New York Review of Books, December 18, 1980